

Before the
PRESIDENT'S COMMISSION ON THE USPS

CHICAGO, ILLINOIS
APRIL 29, 2003

Strengths and Weaknesses of the Current Collective Bargaining Process:
Interest Arbitration

Testimony of George R. Fleischli
Mediator/Arbitrator
Madison, WI

I. Introduction

While I have an educational background and 33 years of experience in the field of labor relations and labor arbitration in particular, I have not systematically studied, and do not pretend to be an expert on, the collective bargaining process in the USPS. As a full-time arbitrator of labor disputes, the bulk of my practice involves grievance arbitration, i.e., holding hearings and issuing binding awards in disputes over the meaning and application of the terms of agreements. However, I also have mediated and arbitrated hundreds of interest disputes, i.e., disputes over the terms to be included in a new agreement.

What I know about the collective bargaining process in the USPS, I have learned by talking to advocates and colleagues, reading press accounts, attending programs sponsored by the National Academy of Arbitrators and conducting hearings in two interest disputes in 1995 and 1999.

In the first case, I served as chair of a panel of three neutrals, appointed to hold a statutory fact-finding hearing pursuant to 39 USC Section 1207(b) of the Postal Reorganization Act (PRA), on issues at impasse in negotiations between the USPS and the National Postal Professional Nurses. In the second case, I served as neutral chair of a tripartite Board of Arbitration, appointed by the Federal Mediation and Conciliation Service (FMCS) pursuant to the terms of a memorandum of agreement between the USPS and the NALC. In that case the parties had agreed to use the services of a mediator (Wayne Horowitz) in lieu of fact-finding, and proceed directly to binding arbitration on any issues that could not be resolved in mediation.

II. The Use of Binding Arbitration to Resolve Interest Disputes.

When Congress passed the PRA, it chose to treat the USPS in much the same way as private corporations are treated for most aspects of their labor relations. Thus, the National Labor Relations Board (NLRB) was given jurisdiction to hear and decide issues over recognition and bargaining unit composition, to conduct elections and hear and decide charges of unfair labor practices. Similarly, the FMCS was given the responsibility for administering the provisions of the PRA dealing with the resolution of impasses in collective bargaining.

However, Congress did not grant postal employees the right to strike. Instead, 39 USC 1207(c) provides for binding arbitration of interest

disputes that cannot be resolved in bilateral negotiations, or through non-binding procedures such as fact-finding and mediation.

Historically, most practitioners in the field of labor relations, including arbitrators, were generally opposed to the use of binding arbitration to resolve interest disputes. The American system of collective bargaining began in the private sector, where the concept of "free collective bargaining" has served to preclude its use in all but a few industries, except during wartime or other national emergencies. Under the terms of the Railway Labor Act and the National Labor Relations Act, each party is free to agree to or resist the proposals of the other party to the extent it deems necessary to protect its own interests, provided it abides by the rules of economic warfare established by law.

The criticisms that have been lodged against interest arbitration begin with the fact that it removes the ultimate decision-making authority from those who best understand the issues and are most directly affected by the proposed solutions. Most other criticisms fall into two categories, sometimes referred to as the "chilling effect" and the "narcotic effect." The argument is that both parties will be reluctant to offer concessions in bargaining if they know that the other side can always invoke arbitration to extract more. That is followed by the argument that once the parties discover that arbitration is an acceptable alternative, they will abandon the difficult process of attempting to resolve their conflicting interests on their own. To these common criticisms I would add two more, based on experience.

Interest arbitration is often described as a conservative process. Because of the heavy emphasis that is placed on internal and external comparisons, it tends to favor the status quo. As a result it can stifle innovation and change. It is generally agreed that the party that seeks to change the status quo carries a burden of proof to show that there are serious problems with the status quo and that the proposed change will eliminate those problems in an acceptable way. In appropriate circumstances, the proponent of change also may be required to offer a quid pro quo. In addition, there is a tendency to focus on those issues deemed important enough to take to arbitration, and sweep lesser issues under the rug. This is especially true in those arbitration systems that utilize radical "final offer" procedures to help overcome the first two problems.

Most contemporary practitioners—including myself—agree that the benefits of interest arbitration can easily outweigh these concerns in certain circumstances, especially in the public sector. This is clearly the case when dealing with essential public services such as police and fire protection and the operation of sewage treatment plants and prisons. It also is true, in my opinion, in the provision of other important public services such as delivery of the mail. In addition, many practitioners in the private sector have come to believe that voluntary interest arbitration, under jointly established parameters, is preferable to the use of economic coercion, where competitive forces threaten permanent loss of business and/or market share. Today, those same private sector concerns apply in the case of the USPS, in my opinion.

III. Overcoming the Problems with Interest Arbitration.

What can be done to overcome these problems with interest arbitration? There are essentially two approaches. One approach is to structure the process in such a way that the parties are strongly encouraged to resolve the dispute short of a binding award. The other approach is far more effective, but cannot be achieved by fiat. It relies upon the representatives of the parties to recognize the shortcomings of binding arbitration and work hard to overcome them. In order to do that, the parties must establish a relationship that is built on a mutual recognition of the legitimacy of the interests of the other party, and agreement on those interests which are shared. Most important of all, their representatives must learn to trust one another. In order to achieve the necessary level of trust, they need to be honest and straightforward in their dealings with one another when their interests conflict.

Two mechanisms that are commonly used to structure the process in order to discourage resort to binding arbitration are fact-finding and final-offer requirements. If the parties go to fact-finding, one of two things will usually happen. The fact-finder may end up mediating the dispute. Mediation by a fact-finder is particularly effective because the fact-finder has the power to make recommendations. If the fact-finder ends up making recommendations, the dissatisfied party is then left with the burden of convincing an arbitrator that one or more of the recommendations should be modified or rejected. The alternative is to first obtain the fact-finder's recommendations and then enter into mediation or further negotiations to bring the recommendations into better alignment with the interests of both parties.

Final-offer procedures come in many varieties. All are designed to raise the stakes, in order to pressure the parties into limiting the issues, and the spread between the issues, that are submitted to arbitration. The hope is that the difference will become so small that they will reach full agreement. A few procedures, like the one used in Wisconsin, raise the stakes very high, by requiring the parties to submit "total package" offers, prior to the selection of the arbitrator. Then, neither party can amend its offer without the consent of the other party. For many years, Wisconsin authorized the arbitrator to mediate, a procedure which served to ameliorate the impact of this rule and resulted in many settlements. For a number of reasons, this provision for "mediation/arbitration" was removed from the statute.

Most final-offer procedures allow the parties to amend their offers until shortly before the arbitrator decides the case, and allow the arbitrator to choose between their final offers on each issue in dispute. Wisconsin's "total package" approach is more effective in limiting issues and the spread between proposals. However, there have been more than a few instances where the arbitrator has been forced to choose between two unreasonable offers, especially since the provision authorizing the arbitrator to mediate was removed from the statute.

Perhaps the most interesting variation was the approach initially used by the State of Iowa. For many years, it required the parties to obtain recommendations from a fact-finder before proceeding to arbitration. If any unresolved issues were submitted to arbitration, the arbitrator could choose the recommendation of the fact-finder,

rather than the proposal of one of the parties, on each issue still in dispute. Not surprisingly, the parties would normally settle their dispute after receiving the recommendations of the fact-finder and rarely went to arbitration.

IV. My Recommendations.

Unless the USPS and the unions that represent its employees jointly ask that you do so, the Commission should not recommend any change in the impasse resolution procedures in Section 1207 of the PRA. If the Commission does recommend changes in the impasse resolution procedures in that section, such procedures should continue function as "default" procedures. They should only apply in the event the parties to a particular dispute fail to enter into an agreement under Section 1206(c) and Section 1207(c)(1), adopting different procedures for the resolution of impasses. Finally, if the Commission does recommend changes it should carefully avoid any change that might be viewed as tampering with the fairness and balance established by the existing procedures.

Why no Change and Continued Flexibility? Unlike the state laws I have referred to, the provisions of Section 1207 are only applicable to one employer, the USPS, and its relationship with the dozen or so unions that represent its employees. Based on my personal experience, I believe the existing provisions are simple and flexible and serve the parties' interests quite well. Both sides are represented by knowledgeable and sophisticated individuals, who have learned to work with the default procedures or adopt changes deemed to be mutually acceptable.

The Postal Nurses are a very small group, with limited resources. In the 1995 case that I was involved in, the parties agreed to follow the "default" provisions of the statute with some minor modifications, and proceeded to fact-finding. In that case, the parties elected not to allow the fact-finders to mediate prior to the issuance of their recommendations. (They had tried the opposite approach in their previous round of bargaining.) I would be less than honest if I didn't point out that too many issues were still on the table when this dispute was submitted to fact-finding. However, the net result was that the parties reached a voluntary settlement that was based on the recommendations of the three neutral fact-finders. They did so on the same day that the recommendations were presented to them by the fact-finders.

In the 1999 case involving the Letter Carriers, the parties entered into an agreement, pursuant to the provisions of Section 1206(c) and 1207(c)(1). In it, they exerted substantial control over the process. They agreed to proceed to mediation in lieu of fact-finding. They established their own procedures for the selection of the mediator and the establishment of the arbitration panel and agreed to the ground rules that would be applicable in both phases of their negotiations. While both parties expended huge sums and efforts in preparation for and presentation of their case, those sums and efforts pale in comparison to the out-of-pocket costs they would have incurred in preparation for and handling of a work stoppage.

Throughout the arbitration phase of their negotiations, the parties continued to meet and resolve issues, so that they would not need to be submitted to the panel. Also, they continued to exert control over the scope and direction of the proceeding. Ultimately, they agreed to limit the jurisdiction of the panel to the resolution of one issue, under a final offer procedure. While use of the final offer procedure insured that one of the parties would "win" and the other would "lose," it also insured that the panel did not issue an award that might be difficult for both parties to accept. As part of the award, it was agreed that the panel would retain jurisdiction to resolve any issues related to the implementation of the award. To my knowledge, the parties were able to resolve all such issues through post-award negotiations.

Why is Fairness and Balance so Important? This question cannot be considered without reference to the right to strike. I realize that federal employees are forbidden to strike, and that engaging in such a strike is still considered a crime. However, in passing the PRA, Congress decided to treat postal employees much like private sector employees are treated under the law. Failure to grant them the right to strike was the single, most important exception to that approach.

It can be argued that, if Congress had granted postal employees the right to strike, it would have done great harm to the Postal Service. I do not disagree. However, one need only look a few hundred miles to the north, to see that, in this day and age, giving postal workers the right to strike does not prevent government from providing for the health and safety needs of the public. I would add quickly, that in my opinion granting postal employees the right to strike would not be in the best interests of the USPS, its employees and the public they serve so well. However, that is due to the adverse impact it would have on the principle of universal mail service, not the health and safety needs of the public.

In the private sector, interest arbitration is universally viewed as a substitute for the right to strike. Many would argue that the same thing is true, or ought to be true, for those public sector employees who are given the right to bargain. Others would argue that negotiations in the public sector are different, and that public sector employees cannot, or ought not, be given the right to strike because public employees are only one of many interest groups whose interests must be weighed by elected officials.

Regardless of how one resolves that philosophical debate, the reality is that if employees are to be given the right to bargain collectively, there must be some mechanism to bring finality and closure to negotiations, in a way that is mutually accepted by both parties. Otherwise, frustrations will build and conditions such as those that preceded the enactment of the PRA may repeat themselves. Under the PRA, interest arbitration is the established means for bringing finality and closure that has been accepted by both sides. In order for that mechanism to continue to work, it is essential that it be viewed as fair and balanced.

In terms of bargaining power, interest arbitration is a great equalizer. For that reason, it has special appeal to government, which places a high value on fairness and balance in its dealings with its

employees. The Commission should ask itself, how much bargaining power would 100 Postal Nurses have vis-à-vis the USPS in the absence of the right to take their dispute to arbitration? You also should ask, what would be the response of postal employees generally if the USPS had the right to insist that they take their disputes to arbitration under a system they viewed as stacked against them? It is not enough that the system be viewed as fair and balanced by those who create it. If it is to work, it also must be viewed as fair and balanced by those who are required to use it.